American Bar Association
www.supremecourtpreview.org

No. 07-581

IN THE
Supreme Court of the United States

14 PENN PLAZA LLC and
TEMCO SERVICE INDUSTRIES, INC.,
Petitioners,

v.

STEVEN PYETT, THOMAS O'CONNELL,
and MICHAEL PHILLIPS,
Respondents.

**On Writ of Certiorari to the
United States Court of Appeals
for the Second Circuit**

BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AND CHANGE TO WIN AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

JONATHAN P. HIATT
JAMES B. COPPESS
(Counsel of Record)
815 Sixteenth Street, NW
Washington, DC 20006
(202) 637-5337

Of Counsel:

LAURENCE GOLD
805 Fifteenth Street, NW
Washington, DC 20005

PATRICK J. SYZMANKSI
1900 L Street, NW
Washington, DC 20036

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

SUMMARY OF ARGUMENT 2

ARGUMENT 2

I. THE COLLECTIVE BARGAINING AGREEMENT IN THIS CASE CANNOT BE CONSTRUED TO BIND THE PLAINTIFF-EMPLOYEES TO ARBITRATE THEIR ADEA CLAIMS AGAINST THE DEFENDANT-EMPLOYERS 4

II. A UNION MAY NOT BIND THE INDIVIDUAL EMPLOYEES IT REPRESENTS TO ARBITRATE THEIR EMPLOYMENT DISCRIMINATION CLAIMS. IN UNIONIZED WORKPLACES, AS IN NONUNION WORKPLACES, THE AGREEMENT TO SUBSTIUTE ARBITRATION FOR LITIGATION OF STATUTORY CLAIMS MUST BE MADE BY THE INDIVIDUAL EMPLOYEE 12

CONCLUSION 19

TABLE OF AUTHORITIES

CASES Page

Abrams v. Communications Workers, 59 F.3d 1373 (D.C. Cir. 1995) 13

Air Line Pilots v. Northwest Airlines, Inc., 199 F.3d 477 (D.C. Cir. 1999) 16

Air Line Pilots v. O'Neil, 499 U.S. 65 (1991) 11

Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974) 12

AT&T Technologies, Inc. v. Communications Workers of America, 475 U.S. 643 (1986) 4

Borden, Inc., 279 NLRB 396 (1986) 18

Cole v. Burns International Security Services, 105 F.3d 1465, (D.C. Cir. 1997) 5

Considine v. Newspaper Agency Corp., 43 F.3d 1349 (10th Cir. 1994) 10

Emporium Capwell Co. v. Western Addition Community Organization, 420 U.S. 50 (1975) 7

Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991) 9, 10, 16

Goodman v. Lukens Steel Co., 482 U.S. 656 (1987) 14

McMullen v. Meijer, Inc., 355 F.3d 485 (6th Cir. 2004) 16

Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985) 10

Neal v. Newspaper Holdings, Inc., 349 F.3d 363 (7th Cir. 2003) 11

NLRB v. Advertisers Mfg. Co., 823 F.2d 1086 (7th Cir. 1987) 17

NLRB v. Magnavox Co., 415 U.S. 322 (1974) 13

Pryner v. Tractor Supply Co., 109 F.3d 354 (7th Cir. 1997) 5

Regal Cinemas, 334 NLRB 304 (2001) 18

Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960) 4, 6

Teamsters v. United States, 431 U.S. 324 (1977) 14

Teamsters Local 391 v. Terry, 494 U.S. 558 (1990) 11

United Food & Commercial Workers, Local 951 v. Mulder, 31 F.3d 365 (6th Cir. 1994) 13

Vaca v. Sipes, 386 U.S. 171 (1967) 6, 7, 11, 14, 15

Wright v. Universal Maritime Service Corp., 525 U.S. 70 (1998) 3, 12

STATUTES

Federal Arbitration Act § 4, 9 U.S.C. § 4 .....3, 4, 11

National Labor Relations Act § 9(a), 29 U.S.C. § 159(a) 17

MISCELLANEOUS

American Bar Association, *Model Rules of Professional Conduct* 16

Restatement (Third) of Agency (2006) 13

IN THE
Supreme Court of the United States

No. 07-581

14 PENN PLAZA LLC and
TEMCO SERVICE INDUSTRIES, INC.,
Petitioners,

v.

STEVEN PYETT, THOMAS O'CONNELL,
and MICHAEL PHILLIPS,
Respondents.

**On Writ of Certiorari to the
United States Court of Appeals
for the Second Circuit**

BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AND CHANGE TO WIN AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

The American Federation of Labor and Congress of Industrial Organizations and Change to Win file this brief *amici curiae* in support of respondents with the consent of the parties as provided for in the Rules of this Court.[1] The AFL-CIO is a federation of 56 national and international labor organizations with a total membership of 10.5 million working men and women. CTW is a federation of 7 national and international labor or-

[1] No counsel for a party authored this brief *amici curiae* in whole or in part, and no person or entity, other than the *amici*, made a monetary contribution to the preparation or submission of this brief.

ganizations with a total membership of 6 million working men and women.

SUMMARY OF ARGUMENT

I. The courts below correctly denied the petition to order arbitration of the statutory discrimination claims in this case. The collective bargaining agreement upon which the petitioners relied does not constitute an agreement for arbitration binding the respondents to arbitrate rather than litigate their claims. As is typical of such collective bargaining agreements, the grievance-arbitration procedure in that agreement provides only for the arbitration of disputes between the union and the employer and gives the union complete control over which employee grievances will go to arbitration. The union here declined to arbitrate the respondents' statutory discrimination claim, and the respondents are not barred from bringing their claim to court by the union's decision in this regard.

II. A union lacks authority to negotiate agreements for arbitration of statutory discrimination claims on behalf of union-represented employees. As a potential defendant, the union has a conflict of interest that precludes the union from representing the employees as to their choice of forum for bringing statutory discrimination claims. Only the individual employees themselves can enter into agreements for the arbitration of their statutory discrimination claims. The employer is free to bargain directly with the employees over such individual agreements for arbitration but only so long as the agreement is not made a condition of employment and does not otherwise entail a mandatory subject of bargaining.

ARGUMENT

The sole question before the Court at this juncture is whether the courts below should have compelled

the respondents, Steven Pyett, Thomas O'Connell and Michael Phillips ("Plaintiff-Employees" or "Employees"), to arbitrate their Age Discrimination in Employment Act claims against the petitioners, 14 Penn Plaza LLC and Temco Service Industries, Inc. ("Defendant-Employers" or "Employers"). That question comes before the Court on an interlocutory appeal from the denial of the Defendant-Employers' petition for an order directing arbitration pursuant to § 4 of the Federal Arbitration Act. 9 U.S.C. § 4.

The Federal Arbitration Act provides for the enforcement of "a written agreement for arbitration" by "an order directing the parties to proceed to arbitration in accordance with the terms of the agreement." 9 U.S.C. § 4. The "written agreement for arbitration" on which the Defendant-Employers rely in petitioning for an order compelling the Plaintiff-Employees to arbitrate their ADEA claims is a multiemployer collective bargaining agreement between Service Employees International Union Local 32BJ ("Local 32BJ" or "Union") and the Realty Advisory Board on Labor Relations, Inc. ("Realty Advisory Board" or "Board").

The briefs for the Defendant-Employers and their *amici* are devoted entirely to the question of whether Local 32BJ had the authority to negotiate an "agreement for arbitration" that binds the Plaintiff-Employees to arbitrate their statutory discrimination claims against the Employers. The prior question, which the briefs on the Defendant-Employers' side carefully ignore, is whether the collective bargaining agreement in question is such an agreement for arbitration. *See Wright v. Universal Maritime Service Corp.*, 525 U.S. 70, 82 (1998). For the reasons set forth in the brief for Service Employees International Union, Local 32BJ, the terms of the collective bar-

gaining agreement do not create an "agreement for arbitration" that binds the Plaintiff-Employees to arbitrate ADEA claims against the Defendant-Employers.

The point of contract interpretation made in the Local 32BJ brief is dispositive here. We therefore begin by reiterating the point made in that brief, generalizing to show why, in this regard, the Local 32BJ/Realty Advisory Board collective bargaining agreement is typical of collective bargaining agreements in general. Having discussed that dispositive point of contract interpretation, we then go on to discuss the more far-reaching question of union authority tendered by the briefs for the Defendant-Employers and their *amici*.

I. THE COLLECTIVE BARGAINING AGREEMENT IN THIS CASE CANNOT BE CONSTRUED TO BIND THE PLAINTIFF-EMPLOYEES TO ARBITRATE THEIR ADEA CLAIMS AGAINST THE DEFENDANT-EMPLOYERS.

"[A]rbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *AT&T Technologies, Inc. v. Communications Workers of America*, 475 U.S. 643, 648 (1986), quoting *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960). In seeking to compel arbitration of the Plaintiff-Employees' ADEA claims, the Defendant-Employers do not contend that there is a bilateral "written agreement for arbitration" directly between the Employees and the Employers. 9 U.S.C. § 4. Rather, the Defendant-Employers rely on a multiemployer collective bargaining agreement between Service Employees International Union, Local 32BJ and various named employer-members of the Realty

Advisory Board, arguing that the Plaintiff-Employees are contractually bound to arbitrate their ADEA claims by the portion of that collective bargaining agreement's no-discrimination clause that provides "[a]ll [discrimination claims] shall be subject to *the grievance and arbitration procedure (Articles V and VI)* as the sole and exclusive remedy for violations." Pet. App. 48a (emphasis added). *See* Pet. Br. 10 & 40.

"[T]he grievance and arbitration procedure" set out in "Articles V and VI" of the collective bargaining agreement provides for the arbitration of "differences arising *between the parties*" to the agreement, i.e., disputes arising between Local 32BJ and any of the covered employers. Pet. App. 43a (emphasis added). That contractual procedure does not empower covered employees to bring statutory discrimination claims against covered employers to arbitration on their own, much less bind covered employees to arbitrate such claims. Rather, that grievance-arbitration procedure empowers Local 32BJ to bring such claims to arbitration as "Union claims," which may only be "brought by the Union alone." *Id.* at 46a.

The collective bargaining agreement here is typical in this regard, as "arbitration in the context of collective bargaining . . . almost invariably means that the union controls the presentation of the . . . issue." *Cole v. Burns International Security Services*, 105 F.3d 1465, 1478 (D.C. Cir. 1997). Where that is so, "the grievance and arbitration procedure can be invoked only by the union, and not by the worker." *Pryner v. Tractor Supply Co.*, 109 F.3d 354, 362 (7th Cir. 1997).

The typical collectively bargained grievance-arbitration provision gives the union exclusive control over the processing of employee claims through

the contractual procedures precisely because the "arbitration of labor disputes under collective bargaining agreements is part and parcel of the collective bargaining process itself." *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578 (1960). "The processing of disputes through the grievance machinery" – including deciding which grievances to present to arbitration and which to settle before arbitration – "is actually a vehicle by which meaning and content are given to the collective bargaining agreement." *Id.* at 581. "[T]his settlement process" assures "both sides . . . that similar complaints will be treated consistently" and allows "major problem areas in the interpretation of the collective bargaining contract [to] be isolated and perhaps resolved." *Vaca v. Sipes*, 386 U.S. 171, 191 (1967). "If the individual employee could compel arbitration of his grievance . . ., the settlement machinery provided by the contract would be substantially undermined." *Ibid.* Allowing the individual employee to bypass the union in this way would both "destroy[] the employer's confidence in the union's authority" and subject the settlement of employee grievances to "the vagaries of independent and unsystematic negotiation." *Ibid.*

The instant case presents a textbook example of why empowering employees to use the collectively bargained grievance-arbitration procedure to arbitrate disputes that the union has determined not to arbitrate would disrupt the functioning of the contractual dispute settlement procedures. The ADEA claims advanced by the Plaintiff-Employees in this case challenge an employment action that Local 32BJ agreed to in advance, i.e., the substitution of a security firm for the Plaintiff-Employees' direct employer, Temco, in providing security services to the Penn Plaza building. SEIU Local 32BJ Br. 15. The

Union only agreed to that substitution after receiving assurances that the new provider of security services would not undermine the area wage rates. *Ibid.* Local 32BJ decided not to arbitrate the ADEA claims challenging that action based on its view that the agreement the Union had made with Temco in this regard was not discriminatory. *Id.* at 16 & 19. If that agreement could be attacked by the adversely affected employees through the contractual grievance-arbitration procedure, it would most certainly undermine "the employer's confidence in the union's authority." *Vaca*, 386 U.S. at 191. If the employer could not rely on the Union's agreement to work out such disputes in advance, it would "return[] the [represented employees] to the vagaries of independent and unsystematic negotiation." *Ibid.* "Competing claims" by various groups of employees with different immediate interests "could only set one group against the other," allowing the employer "to divide and overcome them." *Emporium Capwell Co. v. Western Addition Community Organization*, 420 U.S. 50, 67 (1975).

All that being so, the Defendant-Employers would surely have had good grounds for objecting had it been the Plaintiff-Employees who were seeking an order compelling arbitration of their ADEA claims under Article VI of the collective bargaining agreement. By the terms of the collective bargaining agreement, arbitration is only available to resolve "differences arising between the parties," and claims on behalf of employees may advance to arbitration only as "Union claims . . . brought by the Union alone." Pet. App. 43a & 46a. The grievance and arbitration clauses of the agreement, therefore, clearly do not provide for the arbitration of individual employee claims that the Union has decided to not take

to arbitration. And, construing the grievance-arbitration provisions as providing for employees to proceed to arbitration on their own in the face of a contrary decision by the Union would fundamentally undermine the purpose of the contractual grievance-arbitration procedure by making it ineffective as a means for resolving labor-management disputes.

Here, of course, it is the Defendant-Employers who desire arbitration of the ADEA claims attacking the bargain they made with the Union because the Employers view arbitration as a favorable alternative to litigating those claims. But the Employers cannot compel the Plaintiff-Employees to arbitrate claims that the Employees themselves had no contractual right to take to arbitration in the first place. The Plaintiff-Employees can be compelled to arbitrate the ADEA claims in this case only if there is an agreement between themselves and the Defendant-Employers providing for such arbitration. If the grievance-arbitration provisions of the collective bargaining agreement are construed to provide the Employers with a basis for ordering the Plaintiff-Employees to arbitrate in this case that construction will necessarily control any future case in which an individual employee wishes to compel the employer to arbitrate a claim that the Union has refused to advance to arbitration, regardless of whether the claim has a statutory or a contractual basis. Such a construction would seriously undermine the Union's capacity to act as the exclusive bargaining representative of all employees in the unit and, by doing so, would undermine the effectiveness of the grievance-arbitration procedure as a mechanism for the resolution of labor disputes.

This is not to say that statutory discrimination claims can never be effectively decided through the

arbitration procedure provided in the collective bargaining agreement. The collective bargaining agreement does give the Contract Arbitrators full authority to decide statutory discrimination claims that are presented to them by the parties to the agreement. Pet. App. 48a. And, the agreement does provide for "the award of the Arbitrator being final and binding upon the parties and the employee(s) involved." *Id.* at 45a. The clear intent of the Agreement, then, is that *an arbitrator's decision* of a statutory discrimination claim will be binding on the Union, the covered employer and the involved employee who brought the underlying grievance. Assuming that neither the method of appointing arbitrators nor some other procedural infirmity (such as complete union control over presentation of the claim) negates the preclusive effect of the award with regard to an affected employee's statutory claim, where an individual employee-grievant has requested that the union arbitrate his statutory discrimination claim through the collectively bargained grievance procedure, we can see no reason why the arbitrator's decision of that statutory claim should not be given the same binding effect on the individual employee who requested the arbitration as an arbitration award issued pursuant to the sort of individual arbitration agreement sanctioned by *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991).

It does *not* follow, however, that employee-grievants are bound by their union's decision to not bring their statutory claims to arbitration. The Defendant-Employers suggest – but do not go so far as to actually say – that the Plaintiff-Employees *are* bound by Local 32BJ's decision not to arbitrate their ADEA claims. *See* Pet. Br. 42 & n. 19 (discussing an employee's recourse where the Union refuses to arbi-

trate his statutory discrimination claim). *See also* Chamber of Commerce Br. 11. And, this would seem to be implicit in their reliance on the contractual statement that "the grievance and arbitration procedure (Articles V and VI)" is "the sole and exclusive remedy for violations." Pet. App. 48a. After all, the ADEA claims were advanced through the grievance procedure spelled out in Article V and the Union, which has the exclusive "right to compromise or settle any [employee] claim," *id.* at 46a, did withdraw the ADEA portion of the Plaintiff-Employees' grievance at the arbitration stage. The notion that the Union's decision to drop their ADEA claim in the contractual grievance-arbitration procedure is final and binding on the Plaintiff-Employees is clearly untenable, which is presumably why the Defendant-Employers are unwilling to fully articulate that proposition.

Individual agreements to arbitrate statutory claims are enforceable precisely because, "by agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum." *Gilmer*, 500 U.S. at 26, quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985). In deciding whether to take a grievance to arbitration, a union does *not* act as a "forum" for adjudging statutory claims. Rather, it acts as a collective bargaining representative charged with advancing the best interests of the bargaining unit as a whole. *See Considine v. Newspaper Agency Corp.*, 43 F.3d 1349, 1357 (10th Cir. 1994). Acting in that capacity, a union may decline to arbitrate a grievance for a host of reasons having nothing to do with the merits of the claim. In addition to weighing the merits of the

grievance, the union "has discretion to act in consideration of such factors as the wise allocation of its own resources, its relationship with other employees, and its relationship with the employer." *Neal v. Newspaper Holdings, Inc.*, 349 F.3d 363, 369 (7th Cir. 2003). And, in weighing those various considerations, the union representative does not function as a judge weighing evidence and legal arguments but rather acts on his own investigation of the facts and his own understanding of the bargaining unit's interests.[2]

In sum, the Plaintiff-Employees here are not bound to arbitrate their ADEA claims by the Local 32BJ/Realty Advisory Board collective bargaining agreement nor are they barred from litigating those claims by the Union's decision not to present the claims to arbitration. Since this case is before the Court on an interlocutory appeal from denial of the Defendant-Employers' petition for an order compelling arbitration under the Federal Arbitration Act, it is dispositive that there is *no* "written agreement for arbitration" of the statutory claims in this case between the Employers and the Plaintiff-Employees. 9 U.S.C. § 4.

---

[2] Nor would a suit for breach of the duty of fair representation provide an adequate forum for resolution of an employee's statutory claims that his union has refused to take to arbitration. While establishing that the underlying claims have merit is a necessary condition for establishing a breach of the duty of fair representation, *Teamsters Local 391 v. Terry*, 494 U.S. 558, 590 (1990), it is not a sufficient condition, *Vaca*, 386 U.S. at 192-193. Just so long as the union was acting within "a wide range of reasonableness" in declining to arbitrate the employee's claim, the employee will be denied recovery. *Air Line Pilots v. O'Neil*, 499 U.S. 65, 71 (1991). Thus, an employee may prove that his statutory claim against the employer has merit and still be denied recovery in a fair representation suit.

II. A UNION MAY NOT BIND THE INDIVIDUAL EMPLOYEES IT RERESENTS TO ARBITRATE THEIR EMPLOYMENT DISCRIMINATION CLAIMS. IN UNIONIZED WORKPLACES, AS IN NONUNION WORKPLACES, THE AGREEMENT TO SUBSTITUTE ARBITRATION FOR LITIGATION OF STATUTORY CLAIMS MUST BE MADE BY THE INDIVIDUAL EMPLOYEE.

The courts below denied the Defendant-Employers' petition to order arbitration on the ground that Local 32BJ lacks authority to enter into an agreement for the arbitration of statutory discrimination claims on behalf of the employees the Union represents. Pet. App. 8a. While the Court has no need to decide this question of union authority, *see Wright*, 525 U.S. at 77, it may wish to do so in light of the split that has arisen between the Fourth Circuit, which holds that unions do have such authority, and every other circuit to have addressed the question, which hold that unions do not have that authority. Pet. App. 10a-11a n. 4 (citing cases). If the Court does reach this question, we urge that it reaffirm its holding in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 51 (1974), that unions do not have such authority.

A. The Defendant-Employers' legal argument that unions have authority to agree on behalf of represented bargaining unit members to the arbitration of individual statutory discrimination claims boils down to the simple-minded assertion that, because, as a general matter, "unions may waive individual statutory rights of their members," unions have authority to waive the right of represented employees to bring suit to enforce their statutory discrimination claims. Pet. Br. 23. That represents a fundamental misun-

derstanding of the scope of a union's authority as the exclusive bargaining agent under the National Labor Relations Act.

The union's authority to waive the statutory rights of represented employees does *not* extend to areas where the "union has [a] self-interest of its own to serve." *NLRB v. Magnavox Co.*, 415 U.S. 322, 325 (1974). Thus, as *Magnavox* holds, a union cannot contractually waive the rights of represented employees in areas where the union's interests clash with those of the employees. *Id.* at 325-26. As Justice Stewart put it in concurring with this part of the *Magnavox* decision, the union's "authority [to waive the rights of represented employees] cannot extend to rights with respect to which the union and the individual employees have essentially conflicting interests." *Id.* at 327.[3] Consistent with that principle, the courts have held that a union cannot bind represented employees to arbitrate breach of the duty of fair representation claims against the union. *See Abrams v. Communications Workers*, 59 F.3d 1373, 1382 & n. 13 (D.C. Cir. 1995); *United Food & Commercial Workers, Local 951 v. Mulder*, 31 F.3d 365, 368 (6th Cir. 1994).

As a potential defendant, the union has a direct conflict of interests with respect to an employee's choice of forum for bringing statutory employment discrimination claims that is essentially the same as the conflict of interest the union has with respect to an em-

---

[3] *See generally Restatement (Third) of Agency* § 8.03, comment b (2006) ("If an agent acts on behalf of the principal in a transaction with the agent, the agent's duty to act loyally in the principal's interest conflicts with the agent's self-interest. Even if the agent's divided loyalty does not result in demonstrable harm to the principal, the agent has breached the agent's duty of undivided loyalty.").

ployee's choice of forum for bringing fair representation claims. Indeed, union conduct that violates the statutory antidiscrimination laws would also violate the duty of fair representation. *Vaca v. Sipes*, 386 U.S. at 190. The agreement to arbitrate statutory discrimination claims at issue here covers "[*a*]*ll* . . . claims" of "discrimination against any present or future employee." Pet. App. 48a (emphasis added). If the clause is read to require employees to arbitrate all discrimination claims that would include discrimination claims against Local 32BJ as well as claims against the covered employers. While the Plaintiff-Employees did not join Local 32BJ as a defendant in this ADEA case, they might well have done so, since the Union agreed to the employment action they allege to be discriminatory. And, the Plaintiff-Employees' breach of the duty of fair representation suit against Local 32BJ for refusing to take the ADEA claims to arbitration did allege that the Union had "discriminated against [them] because of their age." JA 36.

Given the substance of the antidiscrimination law, an agreement to substitute arbitration of statutory discrimination claims for litigation would be expected to include claims against both the employer and the union. The union may allegedly have violated the antidiscrimination laws in conjunction with the employer. *See Teamsters v. United States*, 431 U.S. 324, 355-56 (1977) (allegedly discriminatory seniority system);*Goodman v. Lukens Steel Co.*, 482 U.S. 656, 669 (1987) (intentionally discriminatory refusal to file grievances challenging employer discrimination). And, even where there is no alleged union violation, the union may be a necessary party for purposes of relief on the claims against the employer. *See Teamsters*, 431 U.S. at 356 n. 43. An arbitration system

that did not allow an employee to pursue related claims against both the employer and the union in one forum would hardly be a satisfactory substitute for litigation, for "the injured employee [should not] be forced to go to two tribunals to repair a single injury." *Vaca*, 386 U.S. at 187. *See id.* at 187-188 & n. 12.

The dispositive point of *Magnavox*, *Abrams* and *Mulder* is that the union as a potential defendant cannot bind a potential plaintiff as to the forum in which the plaintiff will seek to redress his statutory claims against the union. Given the conflict of interests between a union as a potential defendant and the union-represented employees as potential plaintiffs, the union does not have the authority to make an arbitration agreement binding the employees to arbitrate, rather than litigate, their statutory employment discrimination claims. Each of the union-represented employees must act on his own in making any such agreement.

B. The Defendant-Employers and their *amici* also make a policy argument to the effect that denying unions the authority to negotiate agreements binding represented employees to arbitrate their statutory discrimination claims will preclude arbitration of such claims in the union-represented sectors. Pet. Br. 30-33; Chamber of Comm. Br. 14-18. This is simply not so. Unionized employers may enter into agreements with their employees for the arbitration of statutory claims, just so long as the employee's agreement is voluntary and knowing.

In the first place, as we noted in part I, if an employee requests that the union take his statutory discrimination claim through the collectively bargained grievance procedures to arbitration for a final and binding decision, there are strong grounds for pre-

cluding the employee from bringing that same claim to court, provided that the arbitrator had full authority to decide the statutory claim and the arbitration proceedings allowed the employee "effectively [to] vindicate [his or her] statutory cause of action." *Gilmer*, 500 U.S. at 28 (quotation marks and citation omitted). [4] By his request for a final and binding arbitration decision on his statutory discrimination claim through the collectively bargained grievance procedure, the employee has effectively agreed to substitute arbitration for litigation in a way that the law should recognize just as it recognizes *Gilmer* arbitration agreements.

In the second place, if a union does not have authority to enter into an agreement to arbitrate rather than litigate statutory discrimination claims that binds the employees the union represents, it follows that the employer is free to enter into individual agreements for the arbitration of statutory discrimination claims directly with its union-represented employees. *See Air Line Pilots v. Northwest Airlines, Inc.*, 199 F.3d 477, 485 (D.C. Cir. 1999) ("a proposal to trade that which is not one's to give cannot be a mandatory subject of bargaining"). In other words, unionized employers would be free to negotiate with

---

[4] To ensure that an employee may "effectively . . . vindicate [his or her] statutory cause of action," *Gilmer*, 500 U.S. at 28, a statutory claims arbitration procedure should not give the employer undue control over the selection of the arbitrator, *see McMullen v. Meijer, Inc.*, 355 F.3d 485, 492-95 (6th Cir. 2004), and should allow the employee to control the prosecution of his claim before the arbitrator, *see* American Bar Association, *Model Rules of Professional Conduct,* Rules 1.2(a) & 1.4. In the typical collectively bargained grievance-arbitration procedure, the employer and the union jointly select the arbitrator and the union controls the presentation of employee grievances.

their union-represented employees individual arbitration agreements of the sort sanctioned by *Gilmer*.

An important caveat is that in the unionized employment setting the employer may *not* bypass the union if the negotiations over individual arbitration agreements entail a mandatory subject of bargaining. In particular, a unionized employer may *not* make agreement to the arbitration of statutory claims a condition of employment without first bargaining to impasse with the union over *that* condition of employment.

The union is the "exclusive representative" of all employees in its bargaining unit "for the purposes of collective bargaining in respect to . . . conditions of employment." 29 U.S.C. § 159(a). Terminating workers for refusing to enter into or maintain individual agreements for the arbitration of statutory claims "works a dramatic change in their working conditions (to say the least)." *NLRB v. Advertisers Mfg. Co.*, 823 F.2d 1086, 1090 (7th Cir. 1987). For precisely this reason, any requirement that the employees enter into individual agreements for the arbitration of statutory claims in order to keep their jobs would be one of the "conditions of employment" about which the employer must bargain with the union.

While the union as a potential defendant has a conflict of interests that prevents it from binding the represented employees to arbitrate their statutory employment discrimination claims, there is no such conflict of interests with respect to whether employees will be forced to enter or to maintain such an agreement as a condition of keeping their jobs. The union and the employees have an identical interest in ensuring that the employees will not be faced with

the choice of losing their jobs or involuntarily agreeing to arbitration of their statutory claims. [5]

In this case, the Realty Advisory Board recognized that a unionized employer must bargain with its employees' union before it may make individual employee agreements for the arbitration of statutory discrimination claims a condition of continued employment. That is why the Board proposed to Local 32BJ that their collective bargaining agreements contain a provision allowing the covered employers to make such individual employee arbitration agreements a condition of employment. *See* Local 32BJ Br. 11. When Local 32BJ rejected that proposal, the employer-members of the Board understood that they were not free to unilaterally impose that condition of employment on their union-represented employees.

---

[5] The extent to which the terms of the individual agreements for arbitration of statutory claims may themselves become a "mandatory subject of bargaining" because the employer proposed to make agreement a condition of employment is a complicated subject which would be governed by a set of highly nuanced rules the National Labor Relations Board has developed. *Compare Regal Cinemas*, 334 NLRB 304, 305 (2001), *with Borden, Inc.*, 279 NLRB 396, 399 (1986).

CONCLUSION

The decision of the courts below should be affirmed.

Respectfully submitted,

JONATHAN P. HIATT
JAMES B. COPPESS
(Counsel of Record)
815 Sixteenth Street, NW
Washington, DC 20006
(202) 637-5337

Of Counsel:

LAURENCE GOLD
805 Fifteenth Street, NW
Washington, DC 20005

PATRICK J. SYZMANSKI
1900 L Street, NW
Washington, DC 20036